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ABSTRACT

Recent amendments to Chapter 1 of the Elementary and Secondary Education Act required the U.S. Department of Education (ED) to involve the public in the development of proposed Chapter 1 regulations. The law required ED to conduct a series of regional meetings and to implement "a modified negotiated rulemaking process as a demonstration." This study evaluated ED's implementation of the requirements for regional meetings and negotiated rulemaking. During late May and early June 1988, ED held five public meetings at locations around the country that drew over 700 participants. Identified by ED as particularly important in the development of proposed regulations were the following issues: targeting, parental involvement, schoolwide projects, program improvement, state administration, and national evaluation standards. ED held a 2-day session in July 1988 to negotiate the provisions of the proposed regulations corresponding to the six issues discussed in the regional meetings. The 19 negotiators, who were selected by ED and approved by their respective national associations, representated the same groups as those invited to the regional meetings. The study team reviewed relevant documents and interviewed 47 people. The study assessed the effectiveness of the new rulemaking requirements and concluded, in summary, that the regional meetings resulted in improved public understanding of the new Chapter 1 provisions; however, the lack of consensus on key regulatory issues meant that the new procedures exerted only limited substantive influence on the development of Chapter 1 regulations. (MLF)

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Evaluation of the New Rulemaking Requirements Implemented in the Development of the 1989 Chapter 1 Regulations

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EXECUTIVE SUMMARY

Recent amendments to Chapter 1, included in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100-297), required the U.S. Department of Education (ED) to involve the public in the development of proposed Chapter 1 regulations. The law required ED to conduct a series of regional meetings to "provide input to the Secretary on the content of the proposed regulations." It also instructed ED to implement "a modified negotiated rulemaking process as a demonstration." According to the Conference Report on H.R. 5 (the House reauthorization bill), Congress had two purposes for these activities:

> The goal . . . is to help the regulation writers understand how new activities are likely to impact persons at the implementation level and to help Chapter 1 administrators, teachers, parents and advocates understand how the Department of Education interprets the law.

This study evaluated ED's implementation of the requirements for regional meetings and negotiated rulemaking. Its purposes were to document ED's activities in implementing this legislative mandate and assess the effectiveness of these requirements in achieving their intended purposes.

Acknowledging the difficulty of knowing what the 1988-89 Chapter 1 rulemaking process would have entailed without the new requirements, we have drawn several conclusions about the longer-term appropriateness of regulations-related regional meetings and regulatory negotiation. On the question of whether ED should implement regional meetings of this type in the future, our answer is a qualified yes, although regional meetings are probably not necessary in connection with reauthorizations that are less extensive than the Chapter 1 changes made by the Hawkins-Stafford

Amendments. Future decisions on regional meetings should also consider that such meetings may be as useful from an educational perspective when conducted following promulgation of final rules.

Our assessment of the appropriateness of regulatory negotiation is that this demonstration cannot be considered to be a good model for future rulemaking under Chapter 1. Regulatory negotiation did not produce consensus on the major regulatory questions in the reauthorization of Chapter 1, due primarily to (1) a lack of effective representation of the key interests and (2) inadequate time for negotiation. In a federal education grants program such as Chapter 1, it may be unrealistic to expect a few individuals to negotiate on behalf of all the interests involved in the program, due to the diversity of state and local needs and preferences.

Implementation of the Regional Meetings

During late May and early June 1988, ED held five public meetings at locations around the country, in order to obtain suggestions from practitioners and parents regarding the contents of new Chapter 1 regulations. In response to invitations issued by ED, the meetings drew over 700 participants, including representatives of the categories specified in the law--federal, state, and local Chapter 1 administrators, parents, teachers, and members of local boards of education. The meetings included small-group and general-session discussions of the six regulatory issues that ED had identified as particularly important in the development of proposed regulations; these issues were targeting, parental involvement, schoolwide projects, program improvement, state administration, and national evaluation standards. Although the ostensible purpose of the meetings was to generate suggestions regarding the contents of the regulations,

participants also devoted attention to learning how the new law would change the state and local implementation of the Chapter 1 program.

From the perspective of the participants, the meetings were a success. Across all five meetings, 86 percent of the participants rated them as either excellent or good. Only 10 percent rated the meetings as fair or poor.

ED staff said that the main message from the regional meetings was that a large segment of the Chapter 1 community (except for Chapter 1 parents) wanted only minimal regulations, preferring to rely on the statutory language wherever possible. Two areas in which ED obtained specific guidance for the regulations were in the allocation of funds to Chapter 1 schoolwide projects and the definition of educational deprivation; in both areas, meeting participants argued persuasively for local flexibility.

Implementation of the Regulatory Negotiation

Congress had drawn on the experience of the Environmental Protection Agency (EPA) in requiring ED to convene interest group representatives for the purpose of negotiating key provisions of the proposed regulations. Because the negotiation was to be a demonstration of this rulemaking strategy, Congress said that (1) ED should select the participants, (2) negotiations should be limited to key issues, and (3) the process could waive requirements of the Federal Advisory Committee Act.

To implement the requirement, ED held a two-day session in July 1988 to negotiate the provisions of the proposed regulations corresponding to the six issues discussed in the regional meetings. The 19 negotiators, who were selected by ED and approved by their respective national associations, represented the same groups invited to the regional meetings. Personnel of

the Federal Mediation and Conciliation Service and EPA served as facilitators in the session.

The basis for the negotiation was ED's draft regulations on the six issues, which had been prepared following the regional meetings. The negotiators reached consensus on topics related to each of the issues, but they were not able to agree on some of the most important provisions in the regulations, including those governing (1) how state educational agencies (SEAs) and school systems are to apportion responsibilities for Chapter 1 program improvement and (2) testing activities to be conducted in connection with Chapter 1 evaluation.

The Notice of Proposed Rulemaking (NPRM), issued following the negotiation session, incorporated all of the consensus positions endorsed by the negotiating panel, except for one concerned with the type of state regulations for which an SEA must convene a review committee of Chapter 1 practitioners.

Effects of These Rulemaking Requirements

This study assessed the effectiveness of the new rulemaking requirements on the basis of five criteria:

- Impact on the content of the regulations

  The proposed regulations are different in several areas because of public input obtained through the new rulemaking requirements. The regulatory negotiation did not result, however, in the resolution of important questions involving new provisions for Chapter 1 program improvement and evaluation, as indicated above.

- Success in reaching early consensus on regulatory issues

  Although the negotiation process did not promote early consensus on the most important regulatory provisions, it may have helped crystallize and publicize the positions of the various interest groups, thus permitting the public to comment on the NPRM with greater awareness of how other interests were responding. Indeed,

statements of national association directors cast doubt on whether they considered consensus to be the ultimate goal of the negotiation.

- o Impact on the public's understanding of the new law

  The rulemaking requirements, especially the regional meetings, made a significant contribution to improving the public's knowledge and understanding of the Chapter 1 provisions of the Hawkins-Stafford Amendments, according to the comments submitted on the NPRM and the reports of persons interviewed for this study.

- o Effects on the time needed to promulgate final regulations

  The new rulemaking requirements added new steps to the rulemaking process. Although ED moved expeditiously to carry out its Chapter 1 rulemaking responsibilities, it did not comply with the legislative requirement to promulgate final Chapter 1 rules within 240 days. The new requirements did not shorten the time required to develop final regulations.

- o Cost

  We estimate that the total cost of implementing the new requirements was about $1 million, which we consider to be a fairly reasonable expenditure in light of the increased public understanding of the new law.

In summary, although the new rulemaking procedures, especially the regional meetings, resulted in improved public understanding of the new Chapter 1 provisions, the lack of consensus on key regulatory issues meant that the new procedures exerted only limited substantive influence on the development of Chapter 1 regulations.

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1. Background

As directed in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100-297), the U.S. Department of Education (ED) recently implemented new procedures in developing regulations for the Chapter 1 basic grants program. These procedures consisted of (1) a series of regional meetings held to "provide input to the Secretary on the content of the proposed regulations" and (2) "a modified negotiated rulemaking process as a demonstration" (Section 1431(b) of the Amendments). This report describes the implementation of the regional meetings and negotiated rulemaking demonstration and assesses their effects on the Chapter 1 regulations. Because negotiated rulemaking was intended as a demonstration of this strategy for regulations development, the report also evaluates its appropriateness for Chapter 1 and other federal education programs.

To explain the intent underlying these requirements, the report first reviews their legislative background.

1988 Requirements for the Development of Chapter 1 Regulations

The Chapter 1 rulemaking requirements in the Hawkins-Stafford Amendments[1] are designed to increase public participation in the development of draft regulations. While leaving other rulemaking procedures in place, the Hawkins-Stafford Amendments added new requirements at the beginning of

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[1] The Hawkins-Stafford Amendments reauthorize and revise a number of elementary and secondary education programs, including Chapter 1 of the Elementary and Secondary Education Act. The new law also authorizes several new programs in elementary and secondary education. The Chapter 1 regulations are one of 25 sets of new rules that ED is developing in response to the Hawkins-Stafford Amendments.

the regulations development process. The Conference Report on H.R. 5, the House bill proposing the reauthorization of elementary and secondary programs, describes two purposes for the new rulemaking requirements (House Report 100-567, p. 340):

> The goal of [regional meetings and negotiated rulemaking] is to help the regulation writers understand how new activities are likely to impact persons at the implementation level and to help Chapter 1 administrators, teachers, parents and advocates understand how the Department of Education interprets the law.

Because the two requirements have different histories, they are discussed separately below.

Requirement for Regional Meetings

The text of this requirement is as follows (Section 1431(b)(1) of the Amendments):

> Prior to publishing proposed regulations pursuant to this chapter, the Secretary shall convene regional meetings which shall provide input to the Secretary on the content of proposed regulations. Such meetings shall include representatives of Federal, State, and local administrators, parents, teachers, and members of local boards of education involved with implementation of programs under this chapter.

The requirement arose in the House Education and Labor Committee, where it was included in H.R. 5 as a requirement for the Secretary to convene regional panels for the purpose of reviewing proposed Chapter 1 regulations. The bill required the panels to include the groups listed above plus state school board members.

Interviews with congressional staff involved in drafting this requirement indicated that the Committee intended for the regional panels to promote greater public participation in and scrutiny of the rulemaking process. One former staff member of the Subcommittee on Elementary, Secondary, and Vocational Education said that "state and local education administrators are generally concerned about federal rules being written in

isolation from the groups that must implement them." She said that opportunities for written comments on proposed regulations are not sufficient as a means of public input because ED, in her view, gives little attention to the concerns these comments express. This staff member provided no specific examples of inadequate ED attention to public comments, however. Another staff member reported that the Committee chairman's overarching motivation in endorsing the provisions was to heighten public involvement in Chapter 1 and that regional meetings provided a useful forum for drawing attention to the new statute and highlighting issues important in its implementation.

A Senate staff member voiced a different rationale for the regional meetings, stating that the inherent complexity of Chapter 1 causes many school districts to "take the easy course" in implementing the program and, for example, to operate "pullout" projects in order to avoid audit problems. If they could learn more about the new provisions and the rationale behind them, she said, they might plan and implement better programs, which might not rely on pullouts.

Requirement for Regulatory Negotiation

The text of this requirement is as follows (Section 1431(b)(2) of the Amendments):

> Subsequent to regional meetings and prior to publishing proposed regulations in the Federal Register, the Secretary shall prepare draft regulations and submit regulations on a minimum of 4 key issues to a modified negotiated rulemaking process as a demonstration of such process. The modified process shall waive application of the Federal Advisory Committee Act, but shall otherwise follow the guidance provided in the Administrative Conference of the United States in Recommendation 82-4, "Procedures for Negotiating Proposed Regulations" (47 Fed. Reg. 30708, June 18, 1982) and any successor regulation. Participants in the demonstration shall be chosen by the Secretary from among participants in the regional meetings, representing the groups described in paragraph (1) and all geographic regions. The

> demonstration shall be conducted in a timely manner in order that final regulations may be issued by the Secretary within the 240-day period required by section 431(g) of the General Education Provisions Act.

The Conference Report further describes the conferees' intentions for the demonstration of negotiated rulemaking (pp. 340-1):

> The modified negotiated rulemaking process is meant to be a demonstration, and thus to be more flexible than the process as operated by other Federal agencies. Specifically, the provisions of the Federal Advisory Committee Act are waived to shorten the time and procedures necessary to begin the demonstration. The conferees will look with interest at the regulatory process to see if discussions of program regulations among educators, parents, advocates and Department of Education staff will produce regulations that are more clearly understood and widely supported by practitioners than some prior regulations. The conferees stress, however, that this demonstration is not meant to lengthen the time for issuance of regulations. Final regulations for this program should be issued within 240 days after enactment.

According to interviews, the requirement for negotiated rulemaking was prompted by a superintendent of a Vermont school district, who suggested to former Senator Robert Stafford, then the ranking minority member of the Subcommittee on Education, Arts and Humanities, that regulatory negotiation be used in developing Chapter 1 regulations.[2] The superintendent based his suggestion on his own participation in the regulatory negotiation conducted by the Environmental Protection Agency (EPA) in connection with the Asbestos Hazard Emergency Response Act. Staff of the American Association of School Administrators actively supported this superintendent in seeking the Chapter 1 requirement for negotiated rulemaking.

According to an aide, Senator Stafford endorsed this proposal because it would "provide the field an early opportunity to learn about the new

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[2] The House Subcommittee bill also included a requirement for negotiated rulemaking in Chapter 1. During markup by the full Committee, however, the provision was dropped and replaced with the requirement for regional meetings.

provisions of the law," and it would give state and local administrators a sense of "ownership" of the regulations at an early stage. This staff member said that there was little discussion of the idea among other Senators or their staffs and that they "went along out of deference to Senator Stafford." In response to a question, she said that the Senator's interest was not prompted by any concern that ED would regulate inappropriately, nor was he concerned that the regulations would be overly complex if ED followed its regular procedures.

To simplify the regulatory process and to shorten the time it would take, the requirement included several key modifications to the normal process of regulatory negotiation. One of these modifications required the Secretary to select the participants in the negotiation.[3] Another waived requirements for adherence to the Federal Advisory Committee Act.[4] In addition, by requiring that final rules be published within eight months of the law's enactment, Congress virtually assured that ED would need to conduct negotiations quickly. These modifications prompted the drafters to term the required negotiation a "demonstration," which Congress would observe to determine whether it resulted in regulations that were more "clearly understood and widely supported" than was normally the case under normal rulemaking procedures.

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[3] In the other federal agencies that use regulatory negotiation, the interest groups that are parties to the regulatory issues typically select their own representatives to serve as negotiators. See Chapter 4.

[4] The Federal Advisory Committee Act requires federal agencies to follow specified procedures when seeking advice from committees composed of individuals from outside the federal government (Plocher & Coleman, 1987). For example, advisory committees must provide advance public notice of meetings and must hold their meetings open to the public. When creating an advisory committee, an agency must issue a charter, approved by the General Services Adminstration.

Executive Branch Response to the Proposed Provisions

In letters to the chairmen of the House and Senate Committees, ED--with the approval of the Office of Management and Budget (OMB)--had urged that the regional meeting and negotiated rulemaking provisions be dropped from the reauthorization bills, while they were under development in the two houses. A review of this correspondence indicates that the Department opposed the provisions on the basis that they were unnecessary and inappropriate. In particular, the Department viewed (1) the regional meetings as unnecessary because the Administrative Procedure Act assures the opportunity for public comment on proposed regulations and (2) regulatory negotiation as inappropriate for use in developing rules unlikely to be the subject of future litigation.

An OMB official said that his agency had opposed the requirement for negotiated rulemaking out of a concern that it infringes on the Executive Branch's constitutional authority to implement acts of Congress. In addition, OMB officials believed that the rulemaking provisions would create unacceptable delays in the completion of final regulations, thus impairing the ability of local districts and state educational agencies (SEAs) to implement the new law.

In consultation with congressional conferees, ED offered to conduct both regional meetings and negotiated rulemaking on a voluntary basis, in exchange for Congress deleting the requirements for these two activities. The Department's offer was turned down, however, and in a compromise the conference committee agreed to include both the House's requirement for regional meetings and the Senate's requirement for regulatory negotiation in the final reauthorization bill. In addition, it retained the 240-day time

limit on the issuance of final regulations, which applies to all ED rulemaking and was first imposed on Title I in 1974.

Normal Rulemaking Procedures in ED

Like the 240-day limit, other requirements have shaped Title I and Chapter 1 rulemaking over the years. The most important of these is the Administrative Procedure Act of 1946, as amended. This law imposes certain requirements on "informal" agency rulemaking, as summarized by Plocher and Coleman (1987). As applied to Chapter 1, the Act requires ED to accomplish the following:

- Publish a "Notice of Proposed Rulemaking" (NPRM) in the Federal Register;
- Provide an opportunity for the public to submit written comments on proposed rules; and
- Consider public comments and other relevant material in the preparation of final rules.

The Executive Branch increased the steps in the rulemaking process in 1981, when President Ronald Reagan issued Executive Order 12291. The order required Executive Branch agencies, including ED, to carry out the following steps (Plocher & Coleman):

- Publish semi-annual agendas of planned regulations and existing rules to be reviewed;
- Assess the general economic costs and benefits of all regulatory proposals and submit all proposed and final rules to OMB;
- Refrain from publishing proposed and final rules until completion of the OMB review; and
- Periodically review existing regulations.

Practically speaking, a major effect of the executive order for ED programs has been to create a formal review opportunity for OMB prior to issuance of an NPRM and again before promulgation of final regulations.

Purposes and Methods of This Evaluation

This evaluation was undertaken for two purposes. The first was to document ED's activities in implementing the legislative mandate concerned with regulations development. This was to be accomplished by preparing a description of the activities conducted in implementing the rulemaking requirements. The second purpose was to evaluate the effectiveness of the mandated rulemaking process, in terms of the following factors:

1. The impact of the process on the content of the regulations;
2. Its success or failure as a strategy for reaching consensus on difficult regulatory issues at an early stage and thereby avoiding disagreements during the NPRM comment period;
3. The impact on the public's understanding of the new statutory provisions;
4. The effects on the time needed to promulgate final regulations; and
5. The cost of the process to ED and the parties who participated.

The study team collected data using two methods. The first was a review of relevant documents. These included lists, summaries, reports, and letters related to ED's implementation of the mandated rulemaking requirements. They also included reports and reviews relevant to the process of regulatory negotiation as it is implemented in agencies other than ED. The study team also interviewed 47 people, including (1) ED staff involved in the implementation of the rulemaking requirements, (2) congressional staff involved in the development of the requirements, (3) staff of the outside groups that participated in or observed the rulemaking process, (4) staff of OMB, EPA, and the Federal Mediation and Conciliation Service (FMCS) who were involved in Chapter 1 rulemaking, and (5) the participants in the negotiated rulemaking demonstration. The names

and affiliations of the persons interviewed are shown in the appendix to this report.

2. Design of the Process Used to Develop Chapter 1 Regulations

The combination of programmatic changes and new rulemaking requirements created both tensions and opportunities for ED in implementing the Hawkins-Stafford Amendments. Several special features in the design of this process help explain the conflicting pressures that resulted.

Combination of Regional Meetings and Regulatory Negotiation

The requirements for regional meetings and regulatory negotiation reflect similar legislative interests, as discussed in the preceding chapter. These interests can be summarized as a desire for greater public participation in the crafting of rules by which SEAs and school systems will implement major new initiatives included in the nation's largest program of federal assistance to elementary and secondary education. A strong secondary desire was for greater public awareness of the new law and the rules that would be developed to implement it.

This focus on increased public participation is understandable given the magnitude of the changes embodied in the 1988 Chapter 1 amendments. Particularly important among these changes are provisions mandating local accountability for the quality of instructional services provided under Chapter 1. After 23 years of emphasis on targeting program services on the intended students and expending funds properly on their behalf, the new law said, in effect, that school systems would also be held accountable for improving the academic achievement of Chapter 1 participants. This new focus is evident primarily in the program improvement provisions of the new law but is also indicated in legislative decisions to facilitate the

adoption of schoolwide projects and require national evaluation standards--provisions intended to improve local service quality and accountability.

Congress could have sought public involvement at any of a number of points in the development of these critical provisions and associated regulations. For example, the law could have required ED to hold regional meetings after promulgating final regulations, in order to identify areas in which SEAs and school systems might need additional explanation or technical assistance--through, for example, additions to the Chapter 1 policy manual or help from the Chapter 1 Technical Assistance Centers (TACs).

Instead, however, the law focused two new provisions for public involvement during a single period that was already bound by stringent time lines. As one congressional staffer said, "It was a lot to ask of the Department." Although the combination of the two requirements resulted from a political compromise rather than a considered legislative strategy, ED was required to implement both in such a way as to provide a unified series of opportunities for public participation in the development of draft regulations. As suggested by congressional conferees and as implemented by ED, the key themes of this integration were (1) continuity in the selection of participants and (2) focus on a few key regulatory issues.

Selection of Participants

The statute provided certain guidelines regarding participants in the regional meetings and regulatory negotiation, as follows:

- The regional meetings were required to "include representatives of Federal, State, and local administrators, parents, teachers, and members of local boards of education."
- "Participants in the demonstration [of negotiated rulemaking] shall be chosen by the Secretary from among participants in the

regional meetings, representing the groups described [above] and all geographic regions."

The ED director of the Chapter 1 program, Mary Jean LeTendre, informally added a third standard to these guidelines, which was that the participants in the regulatory negotiation would be practitioners and parents rather than their Washington lobbyists, since the latter had had their say during the reauthorization process.

To permit the regional meetings to be held as soon as possible after enactment of the Hawkins-Stafford Amendments, ED designed a procedure for inviting participants to the regional meetings that would ensure representation from the six groups listed in the law. First, the ED Compensatory Education Programs (CEP) office, which administers Chapter 1, prepared a list of national associations that had been active in the reauthorization and that corresponded to the six groups.[5] Then, each group was invited to nominate a limited number of participants to each of the five planned regional meetings. Upon receiving the names from each organization, CEP sent invitations to each person. Where it appeared that a group would be underrepresented at a meeting, CEP informally invited school districts located near the site of the meeting to send representatives.

To select participants for the regulatory negotiation, CEP personnel identified participants in the regional meetings who seemed, based on their remarks in the regional meeting, to be knowledgeable representatives of their group. These names went into a pool and were used to assemble a panel of 19 negotiators (including Mrs. LeTendre), who together reflected a

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[5] CEP also included national organizations representing private schools whose eligible students receive Chapter 1 services, even though this group was not listed in the law.

balance of representatives from each of the six legislatively mandated groups and each geographic region and who were also reasonably distributed by race and gender. CEP allowed the national associations a review of the representatives who had been chosen to represent their interests. Once the associations indicated acceptance of the relevant nominees, CEP extended invitations to them.

This procedure was successful in several important respects. First, it resulted in the intended groups (i.e., Chapter 1 administrators, local school board members, teachers, and parents) participating in the regional meetings and the regulatory negotiation session. Second, it permitted ED to convene these meetings on relatively short notice, requiring less time than, for example, a mass mailing to all potentially interested individuals or the publication of notices in periodicals that they would have been likely to read. Third, according to our interviews, the procedure satisfied the national associations that had supported the legislative requirements for public participation in Chapter 1 rulemaking. (Indeed, it may even have helped the associations demonstrate their importance to their constituencies.)

Despite its successes, this participant selection process could not ensure that the negotiators would actively represent the interests of the groups from which they had been chosen. The most important reason for this is that the negotiators were selected by ED, not by the groups they were chosen to represent (as is the practice in agencies that regularly use regulatory negotiation). Second, they had very little time to consult with their groups; in most cases consultation consisted of only a meeting with a representative of their Washington association the day before the

negotiation began. Furthermore, because the negotiation was conducted over a two-day period, the representatives had little opportunity to consult with their groups while the negotiation was under way, in order to obtain guidance and try out ideas.

Focus on a Limited Set of Regulatory Issues

The Hawkins-Stafford Amendments specified that regulatory negotiation was to address a limited set of issues, as stated in Section 1431(b)(2):

> . . . [T]he Secretary shall prepare draft regulations and submit regulations on a minimum of 4 key issues to a modified negotiated rulemaking process. . . .

Although not discussed specifically in the legislative history, congressional staff said that the authorization to limit regulatory negotiation to key issues arose from legislative interest in streamlining the process.

According to interviews conducted for this study, participants in the rulemaking process generally approved ED's choices of "key issues." The issues were:

- Targeting,
- Parental involvement,
- Schoolwide projects,
- Program improvement,
- State administration, and
- National evaluation standards.

The authority to limit the regulatory issues subjected to negotiation was a useful design feature, which ED extended to the regional meetings as well as the regulatory negotiation. Most importantly, the limitation permitted ED to focus attention on those issues arising directly from the

Hawkins-Stafford Amendments, rather than allowing time and effort to be diverted to old controversies. Second, it allowed ED to structure debate around issues that were specifically regulatory in nature, rather than re-arguing points that had been settled by Congress in the final version of the law. For example, the negotiation did not address whether there would be national evaluation standards but what they would include. In addition, the focus on a limited number of issues permitted ED to design a concrete, six-part framework for the regional meetings and regulatory negotiation.

The focus on a limited set of issues, however, inevitably resulted in significantly less attention to the issues that were not identified as "key." Although generally concurring in ED's selection of key issues, several respondents noted one issue that they viewed as very important even though it was not raised in the Hawkins-Stafford Amendments--the applicability of the Education Department General Administrative Regulations (EDGAR) to Chapter 1. In the Chapter 1 NPRM, EDGAR is made applicable to Chapter 1 for the first time, which prompted considerable public comment due to implications for state and local accounting procedures.

Summary of the Effects of These Design Features on the Rulemaking Process

The combination of the three features described in this chapter created a unique rulemaking process. Its main elements were two congressionally mandated activities--(1) a series of regional meetings intended to educate the public and surface issues for attention in regulatory negotiation and (2) the regulatory negotiation itself, which was intended to reach consensus on key issues. The success of these activities rested largely on the efforts of the public participants, whom ED chose to represent critical Chapter 1 interests. These efforts were directed to an agenda of six key regulatory issues, which were also chosen by ED.

3. Implementation of the Regional Meetings

During late May and early June 1988, ED held five public meetings at locations around the country to discuss plans for developing Chapter 1 regulations. The meetings drew over 700 participants. This chapter of the report describes the objectives of the regional meetings, the arrangements for planning and conducting them, the members of the Chapter 1 community who participated in the meetings, and their results.

Objectives of the Meetings

The statutory purpose of the regional meetings was to "provide input to the Secretary on the content of proposed regulations." As indicated in the first chapter of this report, congressional staff involved in drafting the Hawkins-Stafford Amendments perceived several additional purposes. These included greater public participation and scrutiny of the rulemaking process and improved understanding of the new statutory provisions and the rationale behind them. In addition, congressional staff who attended the regional meetings said that one of their objectives was to learn the field's reactions to the new law.

ED's arrangements for the meetings indicate that the Department's primary objective was to obtain input on the content of the regulations. To that end, ED (1) developed and distributed issue papers on each of the six key issues it had selected and (2) organized the meetings to facilitate the discussion of these issues. In addition, the Department organized its written summaries of the meetings to address the six issues.

While acknowledging the statutory purpose of the meetings, participants expressed additional motivations for attending the regional sessions, which are relevant to a consideration of whether the meetings fulfilled their purposes. For example:

- A Washington representative of a major education association said that he saw the main role of the meetings as "smoking out the major points of difference and agreement" in interpretation of the new Chapter 1 provisions.
- The executive director of another important Chapter 1 interest group said that the main value of the meetings from his group's perspective was to learn what the other interest groups were most concerned about in the new law and what interpretations they were applying to key provisions.
- A third interest group representative said that the main purpose of the meetings, from his vantage point, was to raise his members' awareness of the new law and to encourage them to become involved in implementation locally.

Interviews with local and state Chapter 1 personnel indicated that they also perceived diverse objectives for the regional meetings.

Because the participants came to the meetings with many different agendas, it is important to judge the effectiveness of the meetings on several bases, including the extent to which they (1) provided input for the development of regulations, (2) indicated areas of potential agreement or disagreement relevant to the upcoming regulatory negotiation, (3) generated interest in the regulations, and (4) informed the field about the Chapter 1 changes arising from the new law.

Arrangements for the Meetings

The most remarkable fact about ED's arrangements is how quickly the Department acted in setting up the meetings. According to our interviews, their primary motivation for acting speedily was their desire to complete the process and provide final regulations to assist the field in

implementing the new law as soon as possible. Within a month and a half of enactment of the Hawkins-Stafford Amendments (on April 28, 1988), ED conducted five meetings around the country. The dates and sites of each of the meetings were as follows:

May 23-24	Atlanta
May 26-27	Langhorne, PA (outside Philadelphia)
June 1-2	Indianapolis
June 6-7	Denver
June 9-10	San Francisco

The Department was able to move this quickly because it had known for several weeks before the bill was signed that this provision was very likely to be included in the final version of the statute. Therefore, ED personnel were able to begin making arrangements before enactment. In addition, interviews with CEP personnel indicated that the program office intended to hold regional meetings whether the requirement was part of the final bill or not, and thus they had started planning for the meetings before they knew the final shape of the bill.

The main policy-related preparations for the meetings revolved around the selection of key regulatory issues and the development of issue papers. After tentatively identifying a set of topics, ED obtained informal approval of the issues from key congressional staff before developing a brief paper on each issue. The papers contained questions and alternatives that were intended to spark discussion (and did). For the rest of the regulations development process, the papers served as an important basis for discussion and debate.

A second critical set of preparations involved selecting and inviting members of the Chapter 1 community to the meetings. Because the statute listed the groups that were required to participate, it was necessary for ED to take steps towards assuring that each group would participate in adequate numbers. As described in Chapter 2, the strategy ED chose was to select certain national organizations and ask each of them to submit the names of persons to be invited to each meeting. CEP then sent invitations to each person whose name was submitted, including a copy of the statute, selections from the relevant legislative reports, the issue papers, the meeting agenda, and a registration form, which invitees were asked to complete and return. The invitations informed invitees that Chapter 1 funds could be used to pay for reasonable travel expenses incurred in attending the meetings. The general public was also invited to attend the meetings through an announcement in the Federal Register on May 6, 1988. In addition, school systems located near the meeting sites were invited to send participants to meetings in which ED expected low turnout of a particular group named in the statute.

As invitees returned their filled-in registration forms, CEP staff used the work-group preferences indicated on the forms to assign participants to groups. CEP also used the forms to select discussion leaders for the groups.

In addition, CEP invited selected educators to address the general session of each meeting. To identify candidates for these speaking slots, CEP staff turned to their contacts in the host cities and to the national associations participating in the regional meetings.

Logistical steps involved in arranging the meetings included selecting the cities in which the meetings would be held, setting the dates of the meetings, reserving suitable conference space, and making necessary arrangements on-site for registration, signs, supplies, and the like. A contractor retained by the Department assisted in these arrangements and in issuing and tracking invitations to the meetings.

Organization of the Meetings

As Mrs. LeTendre said in an interview for this study, ED's objective in its design and implementation of the meetings was that they be "organized, systematic, open, and fair." To that end, the meetings were designed to focus mainly on the discussion of the six issues in the small work groups devoted to each issue. The main activities of the meetings were as follows:

1. The evening before each meeting began, CEP staff met with the small-group discussion leaders and with TAC staff who had agreed to serve as recorders in the small group sessions. The purpose of the meetings was to brief the discussion leaders and recorders on the purpose of the regional meetings and on their roles in the discussion groups. CEP provided them with summary descriptions of the duties of the discussion leaders and recorders.

2. After a registration period for persons who had not pre-registered, the meeting began with a general session, which included remarks from the Assistant Secretary for Elementary and Secondary Education (or her representative) and a welcoming statement from a school system administrator in the host city. Mrs. LeTendre then provided an overview of the Hawkins-Stafford Amendments. A staff representative from one of the congressional education committees provided comments on Congress' interests in the regional meetings and the regulatory negotiation. Several administrators, teachers, and parents from within the region then delivered prepared remarks on the six issues to be addressed in the work groups.

3. The general session at each regional meeting concluded in late morning, and work group assignments were announced.[6] The work groups discussed the questions raised in the issue paper on their topic and developed general recommendations regarding the content of regulations on that issue (often consisting of recommendations not to regulate at all on the issue). When that discussion was concluded, work group participants discussed other regulatory issues in Chapter 1. The recorder took notes of the work group discussions and recommendations; because of their familiarity with Chapter 1, these individuals also provided informal assistance on substantive issues and helped keep the discussions on track.

4. Work group sessions lasted until the end of the first day, when the work group leaders convened to review problems and questions that had arisen. The groups reconvened at the beginning of the second day and worked until late morning. The remainder of the meeting consisted of a general session in which the work groups reported on their activities and the full group prepared its overall recommendations.

5. Within a few weeks, every participant received a summary of the discussions in the regional meeting that they had attended. Later, they also received a copy of the NPRM and an invitation to submit comments to ED.

Interview data and our review of the meeting summaries indicate that the quality of the work group discussions varied broadly, due in part to the effectiveness of the work group leaders in guiding the discussions and keeping them focused on the issue at hand. According to our interview respondents, leaders needed to know Chapter 1 and the Hawkins-Stafford Amendments from a practitioners' vantage point. Although ED only appointed Department personnel to lead work groups in three instances and then only as a last resort, there was consensus that ED personnel were not as effective

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[6] Because the meeting organizers sought broad representation in each work group, some participants were not assigned to the issue groups they had designated as their first choice. At regional meetings in which many participants indicated the same first choice, two work groups were set up for that issue. Program improvement elicited the greatest interest among participants, and at least two groups were formed to address that issue at each session. At one meeting each, two groups were required for national evaluation standards and for parent involvement.

in providing work group participants with a sense of personal involvement and "ownership" of the process as were state and local personnel.

Participants in the Meetings

Available data indicate that ED succeeded in attracting the types of meeting participants that were envisioned in the statute. Overall attendance at the meetings was relatively high, ranging from 176 (at the first meeting, in Atlanta) to 135 (in Denver, the region with the most dispersed population). At each meeting, every participant category in the law was relatively well represented, although registration procedures did not make it possible to determine the precise category and affiliation of each participant.

Table 1 presents the affiliations that participants reported upon registering at each of the five meetings. The totals for the categories specified in the law may be higher than the table indicates because some of the 28 persons who stated an affiliation with the International Reading Association or Migrant Education may be local educators or state administrators involved in the operations of Chapter 1. Data in the table are not adjusted for ED and congressional staff who attended more than one regional meeting; in all 30 ED officials and 8 congressional staff members attended one or more regional meetings.

Interviews with ED staff indicated that they found the contributions of certain types of participants to be particularly helpful in the meetings. For example, they said that the Chapter 1 parents tended to rephrase statutory issues (especially those associated with the program improvement provisions) in ways that eliminated legal terms and made complex subjects easier for everyone to understand. ED staff found legislative

Table 1

Affiliation of Participants in the Regional Meetings

Self-reported Affiliation	Atlanta	Phila.	Indiana.	Denver	San Fran.	Total
School system	32	45	45	36	34	192
SEA	36	29	19	23	28	135
School board	23	9	13	18	23	86
Parent	13	14	20	5	19	71
Teacher	17	5	22	6	18	68
ED	12	13	11	11	11	58
TAC	8	8	10	8	7	41
Natl. assoc.	15	11	1	7	3	37
Intl. Read. Assoc.	3	2	4	3	3	15
U.S. Congress	3	4	3	2	1	13
Migrant ed.	7			6		13
Private school	1	3	3		2	9
Regional Ed. Lab	1		4			5
Higher ed.			1	1		2
Other	2	6	3	3	4	18
No affil. given	3	2	6	6	3	20
Total	176	151	165	135	156	783

representatives of the national associations to be generally less helpful than other meeting participants because they were still fighting battles that had preceded enactment of the Hawkins-Stafford Amendments--and they also tried to get their local affiliates to continue fighting these battles.

Participant Assessment of the Meetings

In general, participants evaluated the regional meetings very positively. Table 2 summarizes participants' written responses to an evaluation form distributed at the meetings. As the table indicates, 86 percent of the participants in the regional meetings evaluated the meetings as either excellent or good, and only 1 percent graded them as poor.

Table 2

Participants' Evaluation of the Regional Meetings
(in percents)

	Atlanta (n=82)	Phila. (n=48)	Indiana. (n=65)	Denver (n=54)	San Fran. (n=79)	Overall (n=328)
Excellent	50%	41%	44%	45%	35%	43%
Good	37	42	46	44	46	43
Fair	8	10	6	7	13	9
Poor	1	3	1	1	2	1
No response	4	3	3	3	5	4

Note: "N" indicates the number of participants returning completed evaluation forms at each meeting. The "overall" column presents the mean percent of all respondents providing the indicated assessment.

Moreover, participants had roughly equivalent reactions at each of the meetings. The percent of respondents assessing particular meetings as either excellent to good extended from 90 (in Indianapolis) to 81 (in San Francisco), with a slightly narrower range in the percent of respondents assessing the meetings as fair to poor (15 to 7).

Participant comments on the evaluation forms included a number of suggestions for improving the meetings. For example, with regard to the opening session, participants had comments such as:

"Spend less time on general session--get right to issues meetings."

"Preliminary planning for participants could be better organized."

With regard to the work groups, participants said the following:

"We could have used more direction on what type of product we should end up with in work groups. Many thought they should actually write regulations."

"A lot of participants came believing they could change the legislation instead of giving input on how to regulate it--that wasted a lot of group time."

"Would have preferred attending more than one work session."

"Work group sessions should not be led by ED staff."

"Need knowledgeable people to guide group discussions."

"Provide resource persons knowledgeable about congressional intent. In several instances, such insight would have saved much discussion relative to varying interpretations of the statutory language."

On general matters, participants said:

"Regional meetings should be held annually, not only when there is a change in Chapter 1."

"I'd find it helpful to have a regional meeting for orientation to final rules and regulations."

"Let us know in advance in which work group we will participate. As a board member, I did not feel as well informed as I might have been--could have concentrated on a particular area had I known which group."

ED's Use of Guidance Obtained from the Meetings

ED staff said that the main message they took away from the regional meetings was that a large segment of the Chapter 1 community wanted only minimal regulations, preferring to rely on the statutory language wherever possible. Meeting participants expressed this viewpoint in connection with all six of the issue areas. They were especially interested in limiting regulations on minimum standards and program outcomes linked to new provisions for program improvement. Participants justified this request by citing what they described as the "statutory emphasis on a maximum of state and local discretion" (as stated in the discussion summary of the Philadelphia meeting).

The primary exception to this viewpoint were requests from Chapter 1 parents that the statute's emphasis on parental involvement be reiterated and made more concrete in the regulations. For example, parents wanted a number of statutory terms (e.g., "meaningful consultation," "training

parents to the maximum extent practicable") to be defined in regulations. They also wanted (1) SEAs to be made accountable for parental involvement in their states and (2) school systems to be required to conduct "parent needs assessments" and evaluations of parental involvement (as stated in the discussion summaries of the San Francisco and Philadelphia meetings).

Two areas in which ED regulations writers said that the regional meetings provided very specific guidance was in the definition of an "educationally deprived" child and the allocation of funds to schoolwide projects.

- o Definition of an "educationally deprived" child

  ED's issue paper on targeting asked if "educationally deprived" should be defined precisely, in order to eliminate state and local variations in the level of student achievement that constitutes educational deprivation. The paper illustrated the problem with this example: ". . . in high achieving local educational agencies (LEAs), an educationally deprived child could be one whose achievement exceeds the national average." Participants in the regional meetings said that a national standard should not be set for this definition and that the previous definition should be retained--a child whose achievement is below that which is appropriate for his or her age. ED's draft regulations adopted that definition.

- o Allocation of funds to schoolwide projects

  The law requires LEAs to allocate funds to schoolwide projects based on the number of educationally deprived children served by the school (Section 1015(b)(6)(A) of the Amendments). As ED's issue paper points out, other schools in the LEA may serve only a portion of the educationally deprived children whom they enroll. If all educationally deprived children are counted in a schoolwide project, these schools may receive a disproportionate share of the LEA's Chapter 1 resources. Regional meeting participants said that LEAs should be given discretion to prevent inequitable allocations. In response, the draft regulations allowed LEAs to base allocations to schoolwide projects on either of two counts:

  -- The number of children in the schoolwide project below the highest ranked child in other project schools in the LEA; or

-- All children meeting the definition of educationally deprived (e.g., those achieving below the level appropriate for their age).

In these and a few other instances, the regional meetings provided guidance to ED regarding how to permit local flexibility within the confines of the law.

ED regulations writers said that they also used input from the regional meetings in developing language establishing (1) maximum time limits for local program improvement activities and joint LEA-SEA plans and (2) maximum levels of teacher supervisory duties under Chapter 1.

4. Implementation of Regulatory Negotiation

In July ED held a two-day negotiating session, in which 19 carefully selected representatives reviewed and reached decisions on draft regulatory provisions. This chapter describes the objectives of the negotiation, the relevant experience of other agencies, the process of planning for and conducting the session, the members of the Chapter 1 community who participated, and the session's results.

Objectives of the Session

In its report on the reauthorization of Chapter 1 (Senate Report 100-222), the Senate Committee on Labor and Human Resources provided two reasons for directing ED to undertake a demonstration of negotiated rulemaking (p. 18):

> First, inviting the education community to work on developing regulations insures their understanding and cooperation in implementing program changes. Second, other agencies utilizing this process have promulgated regulations far more expeditiously and have been extremely satisfied with the outcomes.

In further explanation of the first reason, the report also cites "a greater sense of ownership and therefore compliance with the law by those entities affected by the regulations when these procedures are utilized." This discussion does not point to any deficiencies in previous ED rulemaking for Chapter 1 and its predecessor Title I, nor does it point to any broad category of regulatory problem (e.g., over-regulation, inconsistency with statutes, excessive complexity) likely to occur without regulatory negotiation. With respect to promulgating regulations more expeditiously,

the report does not indicate how negotiated rulemaking might be expected to achieve that result.

Interviews with congressional staff and staff of the national associations involved in Chapter 1 rulemaking emphasized their interest in increasing the overall level and importance of public input into the rulemaking process. As one congressional staffer said, regulatory negotiation made ED "more exposed" and therefore more inclined to take seriously the suggestions offered by the field.

Relevant Experience of Other Agencies

In the congressional debate on regulatory negotiation in Chapter 1, EPA's experience with this rulemaking technique was cited as support for its usefulness and applicability to Chapter 1. In fact, our examination of EPA's and other agencies' use of regulatory negotiation does not indicate any instances in which it has been used in the development of regulations for a federal grants program. In all the other applications we were able to learn about, regulatory negotiation has been used in areas in which federal rules impose burdens or costs on the public that (1) are paid from private sources or state or local governments, (2) are not reimbursed with federal grant funds, and (3) are likely to result in lawsuits against the regulating agency.

A partial list of such regulations includes those governing the following (Administrative Conference of the United States, 1985; McGinley, 1987; Steinzor & Strauss, 1987):

- Removal of asbestos from school buildings;
- Exposure of manufacturing workers to certain animal carcinogens;
- Pollution emitted by wood burning stoves;

- The number of hours airline pilots may work;
- Nonconformance penalties for vehicle emissions;
- Injection of hazardous wastes into deep wells; and
- Farm workers' exposure to certain pesticides.

These regulations and others developed through negotiation share certain additional characteristics beyond the likelihood of litigation and their imposition of burdens or costs on the public, as discussed in Perritt (1986). For example, each regulation addresses a relatively small number of distinct interests, which are well organized to defend their point of view. Moreover, the issues to be negotiated are "mature," in the sense that the opposing interests have well developed positions. In addition, each regulatory area is marked by adversarial relationships among the various interests and the regulating agency. In many such situations, regulatory negotiation has produced agreements that otherwise would not have been possible and that therefore justify the time and expense required to reach them (Administrative Conference of the United States, 1982, 1985; McGinley, 1987; Perritt, 1986; Stanfield, 1986; Steinzor & Strauss, 1987).

Because of the potential of regulatory negotiation to facilitate rulemaking in certain circumstances, the Administrative Conference of the United States in 1982 developed a multi-part recommendation (No. 82-4) of procedures to be used in negotiating proposed regulations. The recommendation is cited in the Hawkins-Stafford Amendments, with the instruction that the Secretary is to "follow the guidance" of the recommendation (except that the "modified process shall waive application of the Federal Advisory Committee Act"). According to the Administrative Conference (1985), this recommendation and the later Recommendation No. 85-5

are intended to constitute a "conceptual framework within which to plan and conduct negotiations." Among their provisions the two recommendations suggest the following:

1. That agencies use a "convenor" to decide whether regulatory negotiation is feasible in a particular instance and whether "individuals can be selected who will adequately represent" the interests to be "significantly affected" by the contemplated rule;

2. That the negotiating parties and the agency consider selecting a mediator "to facilitate the negotiation process";

3. That the negotiating parties should be motivated by "the view that a negotiated agreement will provide a better alternative than a rule developed under traditional processes";

4. That the agency designate a senior official to represent it in the negotiation; and

5. That the goal of the negotiation should be to produce consensus on a proposed rule.

As indicated in this report, the Chapter 1 regulatory negotiation incorporated the second and fourth of these guidelines. The convenor's role, as indicated in the first guideline, was pre-empted by instructions in the 1988 statute. Although the "negotiating parties" generally favored a regulatory negotiation, as suggested in the third guideline, they did so because of the public exposure it would generate, not because they expected the result would be a qualitatively "better alternative." As discussed in Chapter 5, it is not clear that all negotiating parties agreed that consensus was their primary goal, as recommended by the fifth guideline.

The procedures for negotiating the Chapter 1 proposed regulations differed from those used in other agencies in one important respect that is not highlighted by a review of the Administrative Conference's recommendations. This concerns the opportunities ED provided for the interest groups to communicate with their representatives on the negotiating

panel. Negotiated rulemaking procedures in other agencies typically allow time for the interest groups to select their own representatives (through whatever procedure they may choose) and for the representatives to consult with their groups (1) once the key issues have been agreed to and (2) periodically during the various phases of the negotiation. These consultation periods typically last for a week to two months and are planned to ensure that the representatives make decisions that are consistent with the preferences of the interests they represent. The tight schedule adopted by ED--in response to the 240-day deadline--allowed very little time for such consultation, however.

Process Used in Planning and Conducting the Regulatory Negotiation

The Chapter 1 regulatory negotiation occurred on July 19 and 20, 1989. Events leading up to the negotiation included the following:

- Before enactment of the Hawkins-Stafford reauthorization, ED contacted EPA's regulatory negotiation office to discuss that agency's experience with negotiated rulemaking generally and, in particular, with negotiating the asbestos removal regulations. In that discussion Chris Kirtz of EPA urged ED to contact Daniel Dozier of FMCS. Mr. Kirtz and his colleague Deborah Dalton along with Mr. Dozier and Lou Manchise of FMCS later agreed to assist ED in planning and conducting the Chapter 1 negotiation.

- As discussed in Chapter 2 of this report, ED personnel participating in the regional meetings identified state and local participants who represented their groups effectively and were good candidates to serve as negotiators. After adjusting for regional, racial, and gender balance, ED selected a group of individuals and offered their respective national associations the opportunity to review ED's choice of their representative. None of the associations raised any objections. Between June 15th and 22nd, ED contacted the individuals whom it had selected and invited them to participate in the negotiation.

- On July 11, the Federal Register announced the date and place of the negotiating session.

Utilizing the technical support services of its contractor, ED provided several types of written materials to the negotiators prior to the session. These included copies of (1) the amended Chapter 1 legislation; (2) relevant excerpts from the House, Senate, and conference reports; (3) the regulations issue papers; (4) reports on each of the regional meetings; (5) the names, affiliations, and addresses of the negotiators; and (6) the Federal Register notice announcing the negotiating session.

In addition, the negotiators received a letter from Mr. Dozier introducing the negotiation facilitators and describing their roles as that of "keep[ing] the process moving smoothly and assist[ing] in resolving disputes." Mr. Dozier was designated as the chairman and chief facilitator of the session, with assistance to be provided by Mr. Manchise, Mr. Kirtz, and Ms. Dalton.

On July 7, ED sent each negotiator a copy of the draft regulations for each of the six issue areas. In the copy, ED identified all of the proposed regulatory language that was not repeated or paraphrased from the statute--except for draft regulations for national evaluation standards, which were entirely new.

As described by Hoppe and Pringle (1988), the negotiators participated in an orientation and training session the evening before the negotiation began. At this session the facilitators described the purpose of the negotiated rulemaking in terms of reaching consensus, which they defined as "a result everyone can live with." They said that any member of the negotiating panel could prevent a consensus from being reached. The facilitators also described key negotiation terms and concepts and the roles of the various players. In addition, the facilitators assisted the

negotiators in developing the ground rules to be used in the negotiating session. Finally, in this session, the negotiators introduced themselves and described their expectations for the session.

Mr. Dozier summarized the ground rules at the beginning of the negotiation session the next morning. One such rule was that only the designated negotiators could address the session. They could consult privately with their "elbow advisors" (who were generally staff of the national organizations for each of the interest groups represented on the negotiating panel) whenever they wished, however, and they could request time for private caucuses outside the meeting room at any point during the session. Mr. Dozier also explained that ED would negotiate on all six of the issues previously identified and would either publish the consensus positions determined through negotiation as part of the NPRM or would explain in the NPRM why it had made any changes. ED representatives described the other steps in the rulemaking process that would follow the negotiation.

The final introductory activity was ED's presentation of an overview of the draft regulations, including explanations of the Department's regulatory intent and the proposed language of each relevant section.

The actual negotiation of draft regulations in the six areas involved the discussion of problems and possible solutions among the negotiators, as described in detail by Hoppe and Pringle (1988). Where consensus could be reached fairly easily the consensus positions were noted, and the discussion moved on to the next topic. Before beginning negotiations on certain issues, the group requested explanations from ED regarding the history of relevant legislative provisions and program operations. In instances in

which the differences among the parties were substantial and negotiated positions were not readily apparent, the group tabled the topic after discussion and re-raised it later. In some instances, the group designated negotiators with strong interests in a difficult problem to meet privately in order to come up with a proposed solution; the results of these "sidebar" discussions were planned to be reported back to the full group.

A major concern expressed about the conduct of the negotiation was that the two-day period did not allow enough time to address the differences among negotiators in two areas in which participants were strongly committed to certain positions--program improvement and evaluation. Several observers said that, if the session had been chaired more efficiently, these topics could have been discussed more thoroughly than they were. The observers did not know whether these changes would have made it possible for the panel to reach consensus, however. Several of these observers also complained that the participants in the sidebar discussions were not provided adequate opportunities to report back to the group.

Participants in the Negotiation

Important elements in the success of negotiated rulemaking are the characteristics and actions of the negotiators themselves, as described in this section.

Composition of the Negotiating Group

The names and affiliations of the Chapter 1 negotiators are listed in the appendix to this report. The composition of the group was consistent with the statutory requirement for "representatives of Federal, State, and local administrators, parents, teachers, and members of local boards of education involved with implementation of programs under this chapter," as

summarized below. The states in which the participants work are indicated in parentheses.

Federal administrator:

Mary Jean LeTendre, Director of CEP (DC)

State administrators:

Thomas Anderson, Deputy Commissioner for Finance and Compliance (TX)

Thomas Gilhool, Secretary of Education (PA)
(on the second day of the negotiation, Mr. Gilhool was replaced by his assistant, Mitchell Akers)

Oliver Himley, Chief of the Bureau of Compensatory and Equity Education (IA)

JoLeta Reynolds, Associate Assistant Commissioner for Special Education Programs (TN)

Local administrators:

Lynn Beckwith, Associate Director of State and Local Programs (MO)

Joseph Marinelli, Associate Superintendent (FL)

Ambrosio Melendrez, Administrator of Chapter 1 (TX)

Carley Ochoa, Director of Special Programs (CA)

Charles Weber, Principal (PA)

Parents:

Barbara Alexander, Chapter 1 parent and member of the National Coalition of Title I Chapter 1 Parents (CA)

Jane Boyer, state president of the Parent Teacher Association (KY)

Teachers:

Wanda Beauman, teacher and member of the National Education Association (CO)

Fran Gouze, teacher and member of the American Federation of Teachers (GA)

Members of local boards of education:

Judith Fisher, local school board member (NY)

Paul Lueker, local school board member (KS)

In addition, ED selected two members to represent the interests of private schools whose students are served under Chapter 1. They are:

Morton Avigdor (NY)

Michael McCarron (FL)

Participants' Preparation for the Session[7]

The participants varied significantly in their familiarity with the Chapter 1 program and their level of preparation for the negotiating session. In interviews for this study, all reported that they had reviewed the materials sent by ED, although virtually all of them said that they received the draft regulations only a few days before the meeting. The members of the negotiating panel who routinely work with program regulations (e.g., SEA personnel, local coordinators of federal programs) found this review to be considerably easier than did those members whose work does not typically require familiarity with federal regulations (e.g., parents, teachers). Several members of the panel (each of whom was already very familiar with Chapter 1) said that they had reviewed additional written materials beyond those provided by ED; these included the legislative history of earlier Chapter 1 or Title I reauthorizations and briefing materials used in congressional testimony on H.R. 5.

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[7] The remainder of the discussion of negotiation participants excludes consideration of the federal representative on the panel, Mrs. LeTendre. She played a central managerial and policy-making role in the development of the draft regulations and of the rulemaking activities.

All of the negotiators said that they had consulted with advisors prior to the session. The persons with whom they consulted included the following:

- Staff of the Washington headquarters of their respective national associations;
- Practitioner-level members of their national associations; and
- Local colleagues working with Chapter 1.

These consultations ranged from minimal (as reported by the teacher representatives) to extensive (as reported by SEA personnel and local coordinators of federal programs).

In interviews with each participant, we asked whether he or she had developed an agenda or plan prior to the session and, if so, what it was. The state and local administrators were the only participants who reported having thought out their priorities on the issues that the session was planned to address. These priorities involved both the issues that they thought were most important and the changes they wanted to make in the regulatory treatment of those issues (or draft regulatory language from ED that they wanted to retain in the face of expected opposition from other negotiators).

Participants' Reactions to the Session

The negotiation participants expressed mixed reactions to the session, although the predominant reaction was approval. All of the participants said that Mrs. LeTendre had represented ED very effectively, that she was very knowledgeable, and that she conveyed an attitude of seriousness and respect toward the negotiation process and the persons involved in the negotiation. In addition, all were glad to have been part of the negotiation and said that they felt a distinct sense of ownership of the

regulations as a result of their participation. All said they had had adequate opportunity to express their views. Supplementary benefits reported by the participants included the opportunity to build relationships with ED and with other practitioners involved in implementing Chapter 1.

The major problems that participants cited included the following:

- Not enough time in the session

  Ten of the participants said that program improvement and national evaluation standards received too little attention because of the lack of time.

- Uneven levels of program familiarity among the negotiators

  Six participants said that too much time was taken explaining Chapter 1 to participants who were not familiar with the history and operations of the program.

- Lack of experience in negotiating

  Two participants felt that they did not understand negotiating techniques well enough to operate effectively in the session. One said, "I was totally unsophisticated in the workings of this kind of thing. I felt handicapped." Another said, "It took me until the end of the session to understand what was going on. Gee, invite me back." These views contrasted with the experience of other participants, one of whom said, "Having been through this all my professional life, it was not a problem."

Although they did not perceive this as a problem, six participants said that they exercised their own judgment in voicing comments, proposals, and support in the session. (Another four strongly hinted that they operated independently in the session, rather than trying to voice the concerns and perspectives of their interest group.) Strictly speaking, the job of all the negotiators was to represent their interest group in the negotiation. To the extent they did anything else, they may not have fulfilled their main responsibility adequately.

Participants' Activities Following Up on the Session

In our interviews with participants we asked them how they had followed up on the session, in order to find out whether the negotiation results had been communicated to the groups whom the negotiators represented. With a few exceptions, their follow-up activities were fairly limited, as described in the individual examples below. Other participants said they had not communicated the results at all.

State administrators:

- Described the process and results in a speaking engagement at the state association of compensatory education; and
- Circulated a memorandum to state Chapter 1 coordinators and delivered a verbal report at a national meeting of state coordinators.

Local administrators:

- Communicated the results to the state principals association but not the Washington headquarters office;
- Described the process and results in a national newsletter to federal program coordinators; and
- Reported to principals of Chapter 1 schools in the negotiator's district.

Parents:

- Described the process and results in local presentations.

Teachers:

- Conveyed results through a memorandum sent within the school district and in a meeting with the SEA.

Members of local school boards:

- Reported the results to constituents "in a general way" and suggested that the local board consider establishing a Chapter 1 schoolwide project (which the negotiator learned about in the session); and
- Reported to the local board and suggested that it institute negotiated rulemaking in dealing with state administrators.

Private school representatives:

- Notified the Council for American Private Education and local and state school boards; and
- Notified the U.S. Catholic Conference.

ED's Use of the Consensus Positions and Other Input from the Session

The group reached consensus in a number of areas. In many of these instances, however, the negotiators simply gave their approval to language already drafted by ED. Consensus was reached on the following positions, as described in the preamble to the NPRM and included in the proposed regulations.

Targeting:

- An LEA may identify attendance areas with high concentrations of low-income children on either a districtwide or grade span basis.
- Attendance area provisions are made applicable to schools selected to participate in Chapter 1.
- Procedures for the selection of limited English proficient children are clarified.
- The Chapter 1 policy manual must provide guidance on several additional items concerned with targeting.

Parental involvement:

- Consultation with parents regarding Chapter 1 must be organized, systematic, ongoing, informed, and timely.
- Chapter 1 parent involvement activities may be supported with Chapter 1 funds.
- The LEA's written policies must provide for timely responses to recommendations by parents.
- Opportunities for parental involvement must be provided in the planning, design, and implementation of Chapter 1 LEA programs.

Schoolwide projects:

- An LEA may use either of two specified methods for determining the number of educationally deprived children in a schoolwide project.

- An LEA must provide sufficient funds for a schoolwide project to ensure that the project is of sufficient size, scope, and quality to give reasonable promise of success.

- An LEA is not required to demonstrate that services paid for with Chapter 1 funds supplement the services regularly provided in a school operating a schoolwide project.

- In meeting accountability requirements, comparisons of achievement levels must be made between children of comparable standing.

- Eligible private school children residing in the attendance area of a schoolwide project must be determined on the same basis as the number of educationally deprived children in the schoolwide project.

Program improvement:

- LEAs must develop a time line for school improvement.

- Time lines are established for implementation of local school improvement plans and of joint LEA/SEA plans.

- Student needs assessment data must be used to modify the program, if appropriate.

- Private school children must be included in program improvement.

- The effective date for initial data gathering is the 1988-89 school year.

- A school that shows substantial improvement in aggregate performance and substantial progress toward meeting desired outcomes during the time it is planning a modification of its program need not implement that modification.

State administration:

- Standards are set for the assignment of Chapter 1 personnel to supervisory duties.

- An SEA's authority to review and approve LEA applications and to monitor the use of Chapter 1 funds is clarified.

- The committee of practitioners that will review state regulations must include representatives of private school children.

National evaluation standards:

- The Chapter 1 policy manual must include explanatory information on technical standards for Chapter 1 evaluation.

ED rejected only one of the group's consensus positions. It concerned an SEA's responsibility to convene the practitioners' committee to review certain state regulations of Chapter 1. The negotiating group reached consensus that such a committee must be convened before publication of any proposed or final rule or regulation. Based on a concern for limiting the burden on states, the NPRM states that the committee must be convened "only to review emergency regulations prior to issuance in final form"--which is the standard set in the statute. According to interviews, the impetus to reject the consensus position came from OMB.

The NPRM states that ED incorporated the views of a majority of the members of the negotiating group in the NPRM's provisions for national evaluation standards. These provisions include language agreed to by all but one member of the negotiating panel. In several other provisions, the NPRM states that ED based its proposed regulations on the views of some of the members of the negotiating panel.

As discussed in the next chapter, however, no agreement was reached on several of the most important issues addressed in the draft regulations.

5. Effects of the New Rulemaking Requirements

Despite the attention given by ED, Congress, and this study to the implementation of the new rulemaking requirements, it is difficult to determine how the requirements affected the proposed and final regulations for Chapter 1, which were occasioned by the Hawkins-Stafford Amendments.[8] For example, in writing the regulations for the new program improvement provisions of Chapter 1, it was necessary for ED to obtain information from the field on the feasibility of various time lines for planning and implementing instructional change and measuring the effects of such change. Due to the requirement to conduct regional meetings, ED was able to use the meetings to gather this information. If there had been no new requirements for public participation, however, ED might have used some other strategy to obtain this information, such as an informal task force of state and local practitioners appointed to advise on these and other regulatory provisions. Because of the broad scope of the Chapter 1 changes included in the Hawkins-Stafford Amendments and because the changes involved areas in which ED had little experience in writing regulations (such as instructional improvement and accountability for improvements in student achievement), the Department would probably have supplemented its normal rulemaking activities through contacts with practitioners.

Acknowledging the difficulty of knowing what the rulemaking process would have entailed without the new requirements, we have drawn several

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[8] At this writing, ED has not promulgated final regulations. It is currently reviewing the 480 letters sent in response to the NPRM's request for public comment.

conclusions about their longer-term appropriateness. On the question of whether ED should implement regional meetings of this type in the future, our answer is a qualified yes. Meeting participants and persons interviewed for this study said that they had either (1) found the meetings personally helpful in understanding the new law or (2) been told by others that the meetings were useful. Regional meetings are probably not necessary, however, in connection with reauthorizations of a smaller scope than the Hawkins-Stafford Amendments to Chapter 1 and certainly not for changes to the Chapter 1 regulations. Also, there may be other arrangements for regional meetings that would be just as effective as the one specified in the Hawkins-Stafford Amendments, including meetings conducted after promulgation of final regulations and focused strictly on educating the Chapter 1 community in the provisions of the new law.

Based on the five criteria used in this study, we conclude that this demonstration of regulatory negotiation cannot be considered to be a good model for future rulemaking in Chapter 1. At the most obvious level, regulatory negotiation did not produce early consensus on the major regulatory questions in the reauthorization of Chapter 1. We see two major reasons for this failure:

- <u>Lack of effective representation of key interests</u>

  The members of the negotiating panel represented their constituencies inadequately for several reasons. One reason was that ED had chosen them, and therefore they were not closely tied to the groups they were expected to represent. In interviews, some members said that they exercised independent judgment in the negotiation, rather than relying exclusively on what they believed their interest group would want. A second and perhaps more important reason was that they did not have the opportunity or (in some cases) training to work with their respective interest groups in order to try out ideas and test their groups' receptiveness to the proposals made by others.

- Inadequate time for negotiation

  The actual negotiations occurred over a few hours during two consecutive days. Although agreement was reached on a number of relatively minor issues, the negotiating panel did not have time to discuss fully the major concerns dividing them and to develop solutions. To do so would have required at least four sessions of several days each.[9] Although there is no guarantee that this schedule would have resulted in consensus, it would have had a higher likelihood of success than the one that was used. It would also, however, have added to the time and expense associated with the negotiations.

Stepping back from this demonstration, we question whether regulatory negotiation is a feasible strategy for developing regulations to govern federal education grants programs such as Chapter 1. Our concern stems mainly from the difficulty of designating a few individuals to represent the interests of very diverse school systems and SEAs, which have differing preferences and needs for spending federal grant money. This situation contrasts with that of the federal regulatory agencies, whose mission requires them to impose specific costs on the public. Within a given regulatory area, the members of each interest group share a common goal of limiting certain types of costs. They can estimate the costs and other effects of alternative regulatory schemes on their members. In an education grants program such as Chapter 1, the unreimbursed costs to grantees are relatively minimal. Therefore, state and local decisions on desirable regulatory schemes must be made in terms of the unique circumstances of the SEA or school system, circumstances that are largely unrelated to the

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[9] For example, the first session would have been devoted to training the panel members in the contents of the law and in negotiating techniques. The second session would have been used to reach agreement on minor points and to lay out broad options on the major questions. In the third session, the panel would have attempted to reach consensus on the major issues. The fourth session would have been used to report on the acceptance of consensus positions on the major issues by the panelists' interest groups.

federal program. Because of these critical differences, we cannot conclude that regulatory negotiation has the potential to be an effective rulemaking strategy in education grants programs such as Chapter 1.

The remainder of this chapter discusses the effects of the requirements in terms of the study's five criteria.

Impact on the Content of the Regulations

In assessing this area of impact, it is important to recall that the legislative history, as supplemented in this study through interviews with key congressional staff, does not indicate that Congress expected heightened public participation to result in substantive or stylistic changes in the regulations. (They anticipated instead that public participation would encourage greater acceptance and "ownership" of the new statutory provisions and new regulations, thereby promoting greater compliance with the law.) Even so, the analysis conducted for this evaluation identified several areas in which the NPRM is substantively or stylistically different because of the new rulemaking requirements.

The major contributions resulting from the regional meetings are described below. All resulted in regulatory provisions that are consistent with the statute.

Targeting:

- The draft regulations retained the previous definition of an "educationally deprived" child and did not attempt to set an absolute national standard for determining educational deprivation.

Schoolwide projects:

- Rules for the allocation of funds to schoolwide projects were written to allow school systems to use the same standard in counting educationally deprived children attending schoolwide projects and other Chapter 1 schools.

Program improvement:

- The maximum time limits for improving local programs were drawn to balance concerns of (1) parents and others who sought rapid action to improve ineffective Chapter 1 services and (2) Chapter 1 administrators concerned that enough time be allowed for implementing meaningful changes and showing demonstrable results.

State administration:

- Maximum permissible levels of teacher supervisory duties were set to reflect the realistic operations and needs of school systems.

In addition to affirming the provisions noted above, the regulatory negotiation also yielded the following substantive and stylistic changes to the draft regulations.

Parental involvement:

- The draft regulations were revised to affirm that opportunities for parental involvement extend throughout the law.

Schoolwide projects:

- The fiscal requirements for schoolwide projects were simplified, requiring that an LEA ensure that Chapter 1 allocations to a schoolwide project are of sufficient size, scope, and quality to give reasonable promise of substantial progress towards meeting applicable educational needs. The NPRM provides options for determining the minimum allocation to each educationally deprived child in a schoolwide project.

- A provision was drafted making it clear that Chapter 1 program improvement requirements apply to schoolwide projects.

State administration:

- Private school representatives were added to the state practitioners' committee.

- Procedures for convening practitioner committees to review state regulations were refined, although in the NPRM ED overturned the consensus position of the negotiating panel with regard to the types of state regulations that would prompt such a review.

National evaluation standards:

- Technical standards were removed from the draft regulations and will be included in the Chapter 1 policy manual.

These changes are consistent with the statute, although the ED shift on rules for convening practitioner committees has been criticized on the grounds that it reflects only one of several possible interpretations of these statutory provisions.

No evidence is available, however, that would permit us to conclude that (1) these changes represent significant improvements over the draft regulations or (2) the changes would not have been made in the final regulations as a result of public comments on the NPRM.

Moreover, despite these changes, our analysis suggests that the public participation requirements did not affect some of the most important topics addressed in the proposed regulations, which are (1) how SEAs and school systems are to apportion responsibilities for program improvement and (2) testing activities to be required in connection with Chapter 1 evaluation. These issues were important in the regional meetings and were not resolved in the regulatory negotiation. Comments submitted to ED on the NPRM indicate that they are still the subjects of serious debate in the field.

Success as a Strategy for Reaching Early Consensus on Regulatory Issues

As discussed at the end of Chapter 4, participants in the regulatory negotiation reached consensus in a number of areas, and those positions were included in the NPRM. However, the fact that consensus was not reached on the most important regulatory provisions prevents us from concluding that the new rulemaking requirements were successful in helping reach early consensus on regulatory issues. It is not possible to determine whether the inability to reach consensus on these issues resulted from (1) insufficient time to negotiate a compromise, as suggested by several persons we

interviewed, or (2) these issues being inherently "unresolvable," as indicated by a few interviewees.

At the same time, statements made in our interviews cast doubt on whether the national interest groups understood consensus to be an important goal of the regulatory negotiation. Staff directors of several associations said that they participated in regulatory negotiation in order to help develop "the best NPRM possible." However, in developing comments on the proposed regulations, they perceived no obligation to support the consensus positions determined in the negotiation. Although the Administrative Procedure Act ensures the right of any party to comment on proposed regulations, this willingness to later oppose a consensus decision is inconsistent with the spirit of regulatory negotiation. Although we did not find examples of negotiation participants and their national organizations opposing consensus positions in their written comments on the NPRM, their stated willingness to do so calls into question their support for this process. (One reason that they did not oppose provisions agreed to in regulatory negotiation may be that the negotiation did not resolve the most pressing issues requiring regulations.)

On the plus side, however, even in the areas in which no consensus was reached, the regional meetings and regulatory negotiation helped to crystallize the positions of key groups and inform the field on how these groups were interpreting the law (or "smoke out the major points of difference and agreement," as quoted in Chapter 3 from a national association representative who participated in a regional meeting). This function permitted members of the Chapter 1 community to comment on the NPRM

with a greater awareness of the issues likely to figure most prominently in the submissions of others.

In this regard, the comments on the NPRM tend to include almost as much discussion of the commenters' support for provisions in the proposed regulations as of their opposition to other provisions. In interviews, staff of the national associations explained that they were anticipating what other groups would oppose and wanted to strengthen ED's hand in retaining language in the NPRM that was favorable to their own interests. This strategy resulted in at least a superficial tone of partial consensus in much of the public comment on the proposed regulations.

Impact on the Public's Understanding of the New Statutory Provisions

ED staff responsible for reviewing the public comments on the NPRM report that, in general, they reflect a good understanding of the law and the NPRM. The comments deal mainly with issues that are regulatory in nature and tend not to reopen issues settled in the legislation. Moreover, they generally reflect an understanding of the details and nuances of this complex reauthorization.

It is reasonable to conclude that the new rulemaking requirements contributed significantly to this level of understanding. A large number of Chapter 1 practitioners participated in the regional meetings, and ED provided all of them with (1) complete information on the legislation and regulatory issues arising from it and (2) a forum to discuss the new law and learn more about it. Moreover, there was some substantive communication regarding the regulatory negotiation between the national associations and their constituencies. These activities lend support to our assessment that the rulemaking requirements improved public understanding of the new law.

Effects on the Time Needed to Promulgate Final Regulations

ED did not meet the 240-day time limit for promulgating final regulations. However, it moved very quickly to convene the regional meetings and the negotiating session. Within six months of the enactment of the Hawkins-Stafford Amendments, ED had held those sessions, drafted proposed regulations using input from the sessions, obtained clearance on the draft regulations from OMB, and published the NPRM. Given the time typically required to develop and obtain internal clearance of NPRMs on major reauthorizations, we conclude that ED and OMB worked expeditiously to issue the NPRM as soon after enactment as was possible.

The new rulemaking requirements cannot be said to have hastened that process, however. The Department was already committed to developing regulations rapidly in order to assist the field in implementing the new law. We have no evidence to suggest that the new requirements increased that level of commitment. Whatever their other benefits, the requirements added two additional steps to the regulations development process, thus diverting staff time and resources from other regulations-related activities that might have resulted in earlier publication of the NPRM.

Given the large number of comments on the NPRM and the lack of consensus on the major regulatory issues, the new rulemaking requirements are not likely to shorten the period between publication of the NPRM and promulgation of final regulations.

Cost to ED and the Public

CEP personnel estimated the total costs of the regional meetings and regulatory negotiation to be around $925,000. This figure is made up of the

following estimates, which include costs to all parties participating in these activities:

Travel expenses (transportation, food, and lodging)	
Regional meetings	$371,000
Negotiated rulemaking	12,000
ED staff time	55,000
ED's technical support contract	80,000
ED's duplication and mailing expenses	3,000
Salary of non-ED participants	
Regional meetings	396,000
Negotiated rulemaking	9,000

We believe that this estimate is slightly low, because (1) the final cost of technical support activities was somewhat higher than originally projected, (2) the CEP estimate does not include the cost of this evaluation, and (3) the projection for costs of ED staff time seems unrealistically low in light of the extensive activities ED conducted in managing the regional meetings and regulatory negotiation. With modifications made to account for these increases, we estimate that the cost of implementing the public participation requirements was about $1 million.

These costs were reimbursed from several sources. ED staff costs and costs for duplication and mailing were paid out of the Department's Salaries and Expenses appropriation. The costs of the technical support contract and this evaluation were paid out of the Chapter 1 Evaluation and Technical Assistance appropriation. Travel and other expenses incurred by congressional staff were reimbursed by their respective committees. All other costs were paid out of either Chapter 1 program funds or nonfederal sources. Our interview data indicate that Chapter 1 program funds

reimbursed the expenses of most of the educational practitioners and the Chapter 1 parents, with other practitioners, parents, and interested individuals relying on either state and local education funds or their own personal resources to pay their expenses. The national associations used their own resources to pay for the participation of association staff.

Based on the statements of the persons we interviewed and the sophistication of the public comments on the NPRM, these costs seem fairly reasonable in light of (1) the increased public understanding of the new law that resulted from the regional meetings and regulatory negotiation and (2), to a lesser extent, the refinements in the proposed regulations that also resulted.

Summary Assessment

The most obvious success of the new rulemaking requirements has been in educating the Chapter 1 community about the new law and proposed regulations. While the regional meetings and regulatory negotiation also produced changes in the content of the proposed regulations, there was no consensus on changes in the regulations' major provisions. Examining our other criteria, we find that the requirements for regional meetings and regulatory negotiation had little effect on the timing of the regulations, and their implementation costs were reasonable.

Based on this assessment, we conclude that regional meetings can be useful in preparing for the implementation of a large-scale reauthorization, such as the Chapter 1 reauthorization contained in the Hawkins-Stafford Amendments. Our evidence suggests, however, that regulatory negotiation is not an effective rulemaking strategy in education grants programs such as Chapter 1.

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Appendix

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